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SUPREME COURT, U.S.
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NO. 95-1469

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH ORAN RICHARD,

Petitioner,

v.

DAVID R. HINSON, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITIONER'S BRIEF IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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In our petition, we demonstrated that the Equal Access to Justice Act, 5 U.S.C. § 504, has three stated purposes: (1) to redress injuries -- including attorneys fees -- inflicted by past government wrongdoing, (2) to deter future government

wrongdoing, and (3) to provide private parties additional financial incentive to challenge the government's wrongful actions. We demonstrated that EAJA's net-income limitation discriminates among identically-situated claimants, promising less compensation to persons with a net worth of more than $2,000,000, irrespective of the egregiousness of the government's actions or the amount of the attorneys fees incurred. As a result, EAJA's discriminatory provision utterly disserves EAJA's announced purposes. The Government's Brief in Opposition misconceives the Petitioner's cause for complaint and fails to answer these points.

1. In our petition, we suggested that it would be irrational for Congress to make wealth a condition of obtaining redress of grievances against the government. It would violate the equal protection component of the Due Process Clause for Congress to make FTCA awards turn on a claimant's wealth. Just as "[w]ealth . . . is not germane to one's ability to participate intelligently in the electoral process," (*Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966)), wealth is irrelevant -- "a capricious or irrelevant factor" (*ibid.*) -- to one's right to claim redress from the government.

The Government answers that "EAJA neither limits petitioner's access to the courts, nor does it deny him a cause of action that is available to others" (Br. in Opp. 6). The first part of the Government's assertion is irrelevant; the second part is simply not true. The first statement regarding access to the courts, is irrelevant because at no point in our petition did we assert that Mr. Richard had been denied access to the courts or to any other

administrative proceeding. What we did argue -- and here is where the Government is simply wrong -- is that Mr. Richard has been "den[ied] a cause of action that is available to others." Indeed, Mr. Richard has been denied a cause of action under EAJA, and the sole basis for denying Mr. Richard a cause of action is his wealth. This is not a matter of "mathematical nicety" or "some inequality" (*Dandridge v. Williams*, 397 U.S. 471, 485 (1970)), but a pure Government preference based on reasons wholly unrelated to the merits of Mr. Richard's claim. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense" (*Romer v. Evans*, No. 94-1039, slip op. at 23 (U.S. May 20, 1996)).

2. The Government does not deny in any respect that EAJA's net worth limitation disserves the purposes of deterring government wrong-doing. It passes the point by asserting that EAJA does not have to be "rationally related to all of the statues's purposes" (Br. in Opp. 6). The Government's suggest is not well taken. The essence of rational basis review is that "the classification has *some* reasonable basis" (*Dandridge*, 397 U.S. at 485 (emphasis added)). Under the Government's formulation, Congress might have decided to award attorneys fees to every tenth claimant. Such a law admittedly would give potential parties some financial incentive to file suit -- and, thus, in the Government's view, have some reasonable basis -- but it surely is not a rational scheme in light of EAJA's other purposes.

Congress could not have made it clearer that "[w]here parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). Yet Congress did precisely that when it excluded parties serving a public purpose such as Mr. Richard. As we pointed out in our petition, the Federal Aviation Administration behaved, as the NTSB found, in a "wholly unreasonable" fashion when it summarily revoked Mr. Richard's license. For anyone else besides a person situated as Mr. Richard, the FAA would suffer the indignity of having to pay attorneys fees. Instead, the FAA is off the hook because of the fortuity of Mr. Richard's financial status. EAJA's disciplining mechanism has broken down here and failed to protect persons such as Mr. Richard.

3. Finally, the government asserts that persons such as Mr. Richard are "treated differently from the average litigant because, in view of their wealth, there is not a comparable need to relieve them from the deterrent effect of litigation costs" (Br. in Opp. 5). The Government's assertion comes without any basis in fact or logic. EAJA's limitation applies irrespective of the nature of the agency's actions or the actual costs of vindicating a litigant's rights. Mr. Richard's resources were not unlimited and no match for those of an agency determined to wage a war of attrition to cover its wholly unjustifiable actions.

The question presented is substantial. While we recognize the burden Mr. Richard bears in this petition, the fact his burden

is great does not render EAJA's gross discrimination any more rational.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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